ADMINISTRATIVE APPEALS BOARD

ADMINISTRATIVE APPEAL NO. 25 OF 2013

BETWEEN

ZHU LI — Appellant

and

PRIVACY COMMISSIONER FOR PERSONAL DATA — Respondent

Coram: Administrative Appeals Board
- Mr Yung Yiu-wing (Deputy Chairman)
- Mr Philip Chan Kai-shing (Member)
- Miss Ho Yuen-han (Member)

Date of Hearing: 7 January 2015

Date of Handing down Written Decision with Reasons: 4 February 2015

DECISION

Basis of Complaint to the Respondent

1. The Appellant had lodged a complaint to the Respondent against a firm of solicitors, Mayer Brown JSM, the party bound by the decision of the Respondent (hereinafter referred to as "PB"). Having considered the information gathered from the relevant parties, the Respondent decided not to pursue any further the complaint.

The Appellant is not satisfied with the decision and is appealing to the Administrative Appeals Board ("this Board").

2. The events leading to the complaint began in 2011 when the Appellant was seconded to the Hong Kong Office of PB (hereinafter referred to as "the Hong Kong Office") by her employer, China International Intellectech Corporation (hereinafter referred to as "CIIC"), a human resources outsourcing provider in Beijing). Previous to her secondment in Hong Kong, the Appellant had been seconded to the Beijing Representative Office of PB. While she was seconded to the Hong Kong Office, she worked for one of the partners ("the Partner"). On 30 August 2011, while on annual leave, the Appellant wrote an email to the Partner accusing him of some serious misconducts. When PB came to learn about these allegations, its Regional General Counsel ("RC"), Ms Farrell and its Director of Human Resources ("HRDirector") interviewed the Appellant on 5 September 2011 and told her that PB was conducting investigations into the allegations against the Partner.

3. PB has its own computer system and provided an office email account (Office Email Account) for the use of the Appellant. When the Appellant returned to her office in the morning of 9 September 2011, she found her access right to the office computer was disabled. She was told by HRDirector that PB found that she had sent from her Office Email Account to her personal email account with hotmail.com ("the Hotmail Account") some emails containing confidential information of PB and its clients. She did not deny the allegations but all along refuted any suggestion that it was improper for her so to do. First of all the purpose for sending email was to enable her to work outside her office. Secondly she did not agree that there was such a rule of PB prohibiting it, in any event, she claimed that other colleagues always did the same. Therefore, the Appellant did not think that her conduct constituted a valid ground for the request by HRDirector to have its IT personnel to log into her Hotmail Account and to have those emails deleted in her

presence. She believed and still believes that it was an unacceptable intrusion on her privacy. Her secondment was then suspended on the same day.

4. On the following days the Appellant negotiated with PB for the means of returning her personal belongings, including personal documents stored in her personal folder in PB's computer system. As she needed to collect on an urgent basis her personal documents, including her medical report, she had no choice but to sign an internal memo ("the Memo") containing a set of rules to facilitate the return of her belongings. Pursuant to the rules, one Mr McKellar and one Ms Ruby Ng of PB reviewed her personal documents in her presence on 13 October 2011 before releasing the same to her by email on 14 October 2011. In March 2012, PB formally terminated her secondment and subsequently the Appellant instituted legal and arbitration proceedings relating to her employment against PB respectively in Hong Kong and Beijing. On 26 June 2012, she lodged the present complaint to the Respondent. Since then she supplied further information when requested by the Respondent.

The Follow-Up actions of the Respondent

5. After receiving the complaint, the Respondent conducted his usual enquiry with the complainant and the party complained against. On 20 July 2012 the Respondent wrote to the Appellant requesting further information. In the letter[1] the Respondent categorised the complaint into 5 Allegations and set out under each Allegation the answers and information required of the Appellant. In the last two paragraphs of the letter, the Respondent informed the Appellant of three things, firstly that he may not be able to process the case under the Personal Data (Privacy) Ordinance ("the Ordinance") if he is not supplied with reasonably required

[1] Page 155-161 of the Appeal Bundle

information, secondly that the Appellant should refer to the Respondent's Complaint Handling Policy, and thirdly the contact telephone number she can use in case she wants further discussion of the complaint.

6. On 25 September 2012, following a meeting with one Mr Chan of the Respondent, the Appellant emailed him in response to the aforementioned letter. The last two paragraphs[2] of the letter are as follows:

> "I understand the rules of burden of proof and the discretionary power of your office as stated in Paragraphs 3 and 4 of your letter. Following our meeting on 21 September 2012 in your office, I agree to your suggestion that the investigation may be conducted on the basis of Allegation 1 and Allegation 4 as defined in Paragraph 2(ii) of your letter dated 20 July 2012.
>
> I trust the above is in order. Should you have any questions, please feel free to contact me by email or telephone."

These two allegations are[3]:

> Allegation 1: using covert and unfair means to monitor the personal emails of the Appellant;
>
> Allegation 4: keeping the private documents of the Appellant without specifying the duration of retention.

7. Since lodging her complaint on 26 June 2012, the Appellant supplied the following further information in regard to these two allegations:

---

[2] Page 191-192 of the Appeal Bundle

[3] Page 156 of the Appeal Bundle

Allegation 1

(i) At a meeting with one Mr John Budge, of Wilkinson & Grist, the legal representative of PB, she was shown by him a bundle of documents which were transferred from the Office Email Account to the Hotmail Account. Mr Budge also mentioned that he was also aware of her article on arbitration having been forwarded from the Office Email Account to the Hotmail Account;

(ii) She signed a declaration prepared by PB on 15 December 2011. In its Appendix, two emails dated respectively 5 September 2011 and 6 September 2011 with the subject marked [personal] are listed as those sent from the Office Email Account to the Hotmail Account;

(iii) In a letter from PB to the Appellant dated 15 December 2011, these two emails as referred to in (ii) are also listed as among the emails PB undertakes to preserve;

(iv) An email dated 26 March 2012 sent from her employer CIIC in China to her Office Email Account was forwarded to her Hotmail Account.

Allegation 4

(i) The Appellant claimed that soft copies of her medical report dated December 2010, various personal reference letters and personal correspondence stored in her Personal Folder with the computer system of PB were still kept there after her termination of secondment.

8. In response to the enquiry by the Respondent, PB provided certain background information about its dispute with the Appellant. On 30 August 2011, the Appellant emailed the Partner not only making serious allegations about him but

indicated her determination to report the same to relevant regulatory authorities. The Partner asked her to contact him or to contact RC or HRDirector to discuss the matter. PB took the matter seriously and interviewed the Partner. In the course, PB came to learn that there might be some irregularities with the Appellant's application to the Law Society of Hong Kong to sit for the Overseas Lawyer's Qualification Examination ("qualifying examination"). These irregularities, if they existed, PB would be duty bound to report to the Law Society under Principle 11.03 of its Rules in the Guide to Professional Conduct (Vol. 1).

9. On 1 September 2011, PB, in the light of the risks to them, its business and clients, retrieved the following logs for the month of August 2011 for the purpose of investigations:

(i) a log of inbound and outbound email communications on the Appellant's Office Email Account;

(ii) a log of the Appellant's activities on the PB's Document Management System ("DMS"); and

(iii) the Appellant's web access log.

According to PB, in reviewing the logs, it managed to identify certain documents which might be relevant to the irregularities about the application to sit for the qualifying examination.

10. When the Appellant returned to the office from leave on 5 September 2011, she was asked to provide more particulars about her allegations against the Partner and a list of files relating to her allegations which she had worked on with the Partner. The Appellant refused the request. That being the case, on 6 and 7 September 2011, PB retrieved the Appellant's email logs, logs on DMS and web

access logs in relation to her activities on PB's computer system on 5 and 6 September 2011 for the purpose of investigations. In the course of reviewing such logs, PB discovered two things. Firstly the Appellant had deleted from her Personal Folder and the DMS certain documents which appeared to be related to the Appellant's application to sit for the qualifying examination. Secondly the Appellant had sent a number of emails containing and/or attaching sensitive information of PB and its Clients from her Office Email Account to her Hotmail Account. Contrary to the contention of the Appellant, PB alleged sending the email this way was in breach of the firm's policy. PB also explained that its solicitors were able to access remotely through a secure network of its computer system and therefore there was no need for them to forward any items to their personal email accounts in order to work at home.

11. Like what the Appellant alleged, on her refusal to delete those emails in her Hotmail Account, PB suspended her secondment and disabled her access to the firm's computer system. On 19 September 2011 PB asked its Assistant IT Director to allow RC to access the Appellant's Office Email Account, to forward all incoming emails to her supervising partner in the Beijing Office of PB and to set an automatic reply "Out of Office". PB explained that these actions were to ensure emails from its clients to her Office Email Account could be dealt with appropriately.

12. As to the email from CIIC, her employer, to her Office Email Account, PB forwarded the same to the Hotmail Account on the request of CIIC and for the purpose of notifying the Appellant of her termination of secondment.

Decision of the Respondent

13. With regard to Allegation 1, it is not in dispute that PB has conducted monitoring activities on the dates in question. The Respondent noted that the Appellant was informed of the monitoring policy of PB when she signed the

secondment letter. The policy covered the monitoring activities complained of as and when appropriate. Further the Respondent noted that the Appellant had accessed through the intranet of PB to its "Use of the Internet" policy and which policy notified users, inter alia, that its IT Department kept a central log on their web activities. The Respondent therefore came to the view that the Appellant was aware of the monitoring activities and IT policies of PB.

14. Because the monitoring activities were undertaken after some serious allegations against the Partner were made and the irregularities about the Appellant's application to sit for the qualifying examination were raised, the Respondent found that those monitoring activities were not unwarranted under PB's policies as the purpose of monitoring was for the investigations into these allegations. The Respondent was also satisfied that the scope and duration of the monitoring activities were both appropriate to the purpose of conducting the same. The Respondent also accepted it was the normal practice to check emails from the clients to the Appellant's Office Email Account during suspension of her secondment and to set an automatic "Out of Office" reply.

15. For all these reasons, the monitoring of the email of the Appellant, as the Respondent has found, was not unwarranted, and the Respondent concluded that there was no prima facie evidence for Allegation 1.

16. As to Allegation 4, the Respondent accepted the explanation of PB that these documents were kept in view of the on going proceeding against PB. The Respondent further noted another justification for the retention of these documents by PB. Those documents might be relevant to a complaint against PB under the Ordinance and which complaint might be made within two years after the complainant came to the knowledge of the possible breach of the requirements under the Ordinance. Indeed, the Appellant did make such complaint.

17. In these circumstances, the Respondent did not think that there was prima facie evidence of a breach of the requirements of the Ordinance and decided not to pursue the complaint further.

Decision of this Board

18. The dispute between the Appellant and PB all started when the Appellant blew the whistle. She did not hide her feeling that she deserved better treatment by PB than she actually received. This Board can only have sympathy for her feeling aggrieved. There is hardly anything in the laws of Hong Kong enacted especially for the protection of whistle blowers. This Board and the Respondent could hardly be of any help in providing protection and remedy in that direction. All that can be done in this appeal, if of any help to her cause, is to determine whether the Respondent should carry on with the enquiry or even initiate a formal investigation of the complaint as embodied in Allegations 1 and 4. As to whether or not she is rightly and fairly dismissed by PB, neither the Respondent nor this Board can pass judgment on. This is because it is not our function to discover whether the allegations against the Partner are justified or that to explore the nature of irregularities against the Appellant when applying to sit for the qualifying examination.

19. In her submission and Grounds of Appeal, the Appellant cast a wide net over the possible breaches of the Ordinance. It may not be helpful to deal with the Grounds of Appeal, their sub-grounds, arguments incidental thereto one by one or in the order as presented by the Appellant. In this regard the Board is indebted to Ms Lam, counsel for PB, to point out that there are only two issues that this Board should focus on, the justifications for the monitoring activities by PB and its retention of documents.

20. The Appellant advances certain general criticisms on the decision of the Respondent. She accuses the Respondent of not making clear what decision he was making. He only informed her that he would not pursue further the complaint. She did not know whether his decision was to refuse to carry out an investigation or to terminate an investigation already initiated. The choice of words by the Respondent might not be clear in the strict legal sense but his decision should be clear.

21. S38 of the Ordinance obliged the Respondent to *carry out* an investigation specified in the complaint. This obligation is subject to his discretion under s39 which empowers him to refuse to *carry out* an investigation or to terminate it after its initiation. If an investigation is formally initiated, the Respondent would have certain drastic powers, including search of premises, summoning witnesses etc. and to write a report at the end of the investigation. Furthermore, the data user has to be formally notified of such investigation being initiated unless such notice would prejudice the purpose of the investigation (see s41 of the Ordinance). In the particular circumstances of this case, while the complaint was made known to PB, PB was not formally notified of an investigation. Obviously no formal investigation has been initiated at any stage. The decision not to pursue further the complaint is nothing but a decision not to *carry out an investigation* within the meaning of the Ordinance. It is understandable that the Respondent may want to avoid these words, "not to carry out an investigation" and which words carry a false and misleading impression that the Respondent has not done or does not want to do any investigation in the ordinary sense. In the instant case, the Respondent has made enquires with PB, gathered further information from the Appellant, discussed with her the complaint to work out a strategy. All these work by the Respondent would certainly be viewed as investigations in the ordinary sense of the word. To use these words "not to pursue further the complaint", the Respondent just wanted to represent the situation more aptly. As Ms Lam curtly pointed out, the wording or the nature of the decision is not

important. Whether or not an investigation has been initiated formally, it is within the discretion of the Respondent not to pursue further. The ultimate question is whether the Respondent has exercised his discretion judiciously and properly.

22. The Appellant has also raised some serious allegations against the decision process of the Respondent. She argued that the decision is arbitrary, its due process and procedure not being followed, findings self-contradictory. Her argument runs as follows. By a letter[4] dated 9 October 2012, the Respondent informed her that her complaint was accepted. According to the flow chart[5] which the Respondent provides her with a view to assisting the complainants, a complaint would only be accepted if there was prima facie evidence of a breach of a requirement of the Ordinance. The flow chart is to help a complainant to understand more easily the complaint handling policy. Read it together with the Respondent's Complaint Handling Policy, it certainly states that a complainant has to provide information which shows prima facie evidence that there may be a contravention of a requirement under the Ordinance before a complaint is accepted. Therefore when the Respondent said later that there was no prima facie evidence in making his decision, he was contradicting himself. The fallacy of the argument can be seen that the information put before the Respondent was not the same at different stages. When accepting the complaint, the information is one sided coming from the Appellant. After accepting the complaint, the usual enquiry with the data user, PB, brought in further information. The Respondent had to consider all information available from the Appellant and from PB. After considering this available information, it is quite legitimate for him to come to the conclusion that there is no prima facie evidence after all. The question is whether his conclusion when making the decision is correct. His discretion and deliberation of the evidence of the complaint would be totally and unjustifiably

[4] Page 201 of the Appeal Bundle
[5] Page 318 of the Appeal Bundle

fettered if he has to find a prima facie case that there is a contravention of a requirement under the Ordinance. This Board therefore does not find that the Respondent was contradicting himself. If he is right in finding there is no prima facie evidence, he is merely following the declared policy and there is nothing arbitrary about his decision. For all these reasons, there is no merit in this argument of the Appellant. As to the fact that the Respondent failed to reach a decision to investigate within 45 days, it does not affect the validity of the decision. There is nothing to suggest that the delay should affect the subsequent decision the Respondent has made.

23. As to the monitoring activities referred to in Allegation 1, the Appellant was aware of the monitoring policy of PB. The Respondent finds that the monitoring activities conform with the policy as they are appropriate in view of its purpose. This Board agrees with him. The Appellant takes issue with the purpose as claimed by PB. The Appellant's challenge is that the Respondent should investigate further before accepting that the purpose is for the two investigations. She suggested that the purpose is not for internal investigations but to punish her. She goes at length to demonstrate that there has been no independent investigation into the misconduct of the Partner and the whole purpose is to cover up the misconduct and to protect the interests of PB. In response to that the Respondent submits that this point of ulterior motive is not raised in her complaint as embodied in Allegation 1 and she should not be allowed to raise the point of ulterior motive in the Appeal. Be that as it may, this Board is of the view that the finding of the Respondent is supported by the circumstances of the case. In view of the serious allegations of misconduct against the Partner, it defies common sense that PB would not conduct investigations into the allegations as it claimed it did. Whether PB would cover it up as asserted by the Appellant is quite besides the point. In the event of a subsequent cover up, and of which event this Board cannot overemphasise that there is no evidence whatsoever,

the cover up does not make the original lawful purpose void ab initio. The Appellant further argues that PB should resort to other means of investigation before monitoring her personal data. Even if these means exist, it is still reasonable for PB to conduct the monitoring activities to protect its interests.

24. The Appellant has also made quite an effort to argue that no investigation or independent investigation PB has undertaken. Be that as it may, the relevant point is that the Respondent is right in accepting or rather, sees no reason in rejecting the claim by PB that the purpose for monitoring is for investigation into those allegations.

25. The secondment of the Appellant was apparently terminated because of her breach of PB's policy prohibiting sending documents to her Hotmail Account. Whether she was in breach or not provokes strenuous arguments from all sides. But this issue is a red herring. This Appeal has no concern with the issue of the dismissal of the Appellant. Suffice to say that PB's monitoring policy was made known to the Appellant and it is within the legitimate interest of PB to monitor the activities the way and for the period it did. Therefore the monitoring activities in question are not covert or unfair means as alleged by the Appellant.

26. For all these reasons, the Respondent rightly concludes that there is no prima facie evidence to support Allegation 1.

27. As to Allegation 4, it cannot be disputed the retention of documents is justified because of the pending arbitration and legal proceedings and also of the complaint proceeding to the Respondent. Under these circumstances, the Respondent is entitled to find that there is no prima facie evidence to support Allegation 4.

28. The Appellant raised a lot of points to show there are a lot of areas the Respondent should look at before deciding not to pursue the complaint further. The

Respondent has correctly pointed out many of these points were not raised and should not be entertained in this Appeal. This Board agrees. The Appellant has also shown her disappointment and dissatisfaction with PB in dealing with her complaint of misconduct against the Partner. These points could hardly advance her case in this Appeal.

29. By s38 of the Ordinance, the Respondent is under a duty to carry out an investigation of a complaint and at the same time by s39 he is given the discretion to refuse or terminate an investigation if any of the conditions stipulated in s39 is fulfilled. In the instant case, the Respondent invokes s39(2)(d) which enables him to refuse to carry out an investigation or to terminate an investigation if he is of the opinion that for any reasons not mentioned in s39 an investigation or further investigation is not necessary. It is trite law that the term "for any reason" must mean "for any reasonable reason". An arbitrary reason cannot be a reasonable one. In the instant case, the Respondent is following his Complaint Handling Policy paragraph 8(d) which echoes s39(2)(d) of the Ordinance and states in effect that: "an investigation or further investigation may be considered to be unnecessary if there is no prima facie evidence of any contravention of the requirements of the Ordinance." To certain extent this provision does not exhibit clear logic. It may be difficult for some to understand why an investigation is unnecessary because there is no prima facie evidence. Some may even argue that if and when there is no prima facie evidence, it should render an investigation or further investigation more necessary.

30. In the present case, if the Respondent is to continue the enquiry or investigation, he must proceed on the basis doubting the veracity of the background and the version of events given by PB, in particular the purpose of the monitoring activities and the retention of the documents. There is nothing before this Board to show he could have any reasonable grounds to do so. That limited resources the Respondent has may be real but more importantly it is for him to balance the interest

of the complainant and the data user. The objective facts about Allegations 1 and 4 are substantially not in dispute. What the Appellant urges the Respondent to do is no less than a fishing expedition on the adequacy of the personal data system maintained by PB. This could not be fair to PB in view of the fact that there is no prima facie evidence and it has provided the materials and information about the allegations.

31. Furthermore, s21(2) of the Administrative Appeals Board Ordinance provides in effect that:

> "The Board, in the exercise of its powers, shall have regard to the policy — of the Respondent —"

Having regard to the Complaint Handling Policy of the Respondent and in view of all circumstances of the case, this Board does not see any special ground to justify a departure from the policy. The Respondent having made his decision on the correct findings and following his policy, this Board does not find any ground for disturbing his decision. The Appeal is dismissed.

(signed)

(Yung Yiu-wing)
Deputy Chairman
Administrative Appeals Board